MOTION FILED APR 27 1955

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

376

JOHN P. PETERS,

Petitioner,

vs.

OVETA CULP HOBBY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF IN SUPPORT THEREOF

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
Attorneys for Emergency Civil Liberties Committee Amicus Curiae.

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Emergency Civil Liberties Committee by its counsel, hereby moves this Court for leave to file the attached brief *amicus curiae* in the above matter.

The grounds for this motion are that this case involves matters which go far beyond the issue of government employment discussed by the parties to this proceeding and raise issues which are of great public importance. The Attorney General has consented to the filing of this brief.

Respectfully submitted,

LEONARD B. BOUDIN,
VICTOR RABINOWITZ.

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BRIEF OF THE EMERGENCY CIVIL LIBERTIES COMMITTEE, AS *AMICUS CURIAE*

It is evident that the issues raised in this case are of profound importance. Directly, they affect the rights of employment of a part-time, unclassified, intermittent employee of the United States. The implications of any decision of the Court, however, may have far-reaching repercussions on the administration of the loyalty program in all of its aspects.

It would be difficult to overstate the extent of that loyalty program. Every man, woman and child who wishes a passport must satisfy an administrative official in the Passport

Office of his or her loyalty. Every person who works in a defense facility must pass a loyalty test administered by the Defense Department. Every longshoreman and every member of the Merchant Marine must meet the loyalty tests imposed by the Coast Guard. Every member of the Armed Forces must comply with the loyalty standards imposed by the Army, Navy and Air Force and, of course, every employee of the United States Government must meet the requirements which were imposed on the petitioner in this case and which he failed to meet.

Nor is this all. In most, if not all states, employees of state, county and municipal governments are subject to loyalty checks by a variety of local governing bodies. Because our children are said to be particularly susceptible to subversive influences, school teachers at all levels, from kindergarten to graduate schools, must undergo the same scrutiny of their organizational affiliations and activities, past and present, administered by local Boards of Education.

Recently in the District of Columbia, a license to deal in second-hand furniture was denied, on grounds of possible disloyalty of the applicant, and we are told that in Indiana wrestlers and boxers are subject to a loyalty test by the local authorities before they may perform before their public.

It is not particularly surprising that many private employers, notably in institutions of higher learning, have imposed similar tests.

The end is not yet in sight. The Federal Communications Commission has before it a proposal to screen all applicants for and holders of radio operator's licenses and permits, said to number almost a million persons. The American Bar Association proposes a similar test for attorneys. The list could be expanded almost indefinitely.

This dismal picture raises two questions, both of which go to the heart of any democratic system of government.

One of these questions is substantive. The imposition of loyalty tests on large groups of persons, aggregating, perhaps, a majority of the adult working population of the United States, is basically contrary to the fundamentals of a free political system. The standards of loyalty vary widely from one administrative agency to another and often from one case to another within the same agency. The concept of "defense facility" is an elastic one. As many serious commentators have pointed out, the sum total of all of this has been to destroy free discussion of basic political and economic issues, and without such discussion democracy cannot exist.

The other question raised is procedural, and it is the procedural question that must be decided by the Court in this case. As has frequently been noted, our liberties are, in large part, made up of the strict observance of the procedural standards of due process prescribed by the Constitution. None of those standards is observed in the administration of the loyalty program either by the Federal Government, by state or local governments, nor by any administrative agencies.

The record in this case, shocking as it is, is typical of the procedures through which many thousands of our citizens have lost their means of livelihood, and been stamped as "disloyal" in the minds of their fellow Americans. The respondents here seek to answer all of this by the citation of cases such as *Shurtleff* v. *U. S.*, 189 U. S. 311; *Eberlein* v. *U. S.*, 257 U. S. 82 and a host of similar cases, involving for the most part the removal of government employees for inefficiency or misconduct. The citation of those cases reveals a lack of appreciation of the magnitude of the problem which confronts this Court and the people of the United States.

Basically the issue here is not the right of the petitioner to maintain his employment, but rather the right of the people of the United States to maintain their democracy.

When dismissals from Government employment are based on the violation of civil service rules relating to the proper performance of duty, it may be that no constitutional issue is raised. When dismissals are based on regulations which impinge closely on the constitutional right of all persons who live in a democracy to think and talk, even though those thoughts and words may be characterized by some administrative official as disloyal, a problem of entirely different nature is raised.

It is evident from even a cursory examination of the record that none of the requirements of due process were met here, and, indeed, respondent does not seriously claim otherwise. Fundamental to any concept of due process is that decisions shall be made on the basis of evidence contained in a record and not on the basis of secret information known only to the tribunal which decides the case.[1] This is so elementary that it would seem quite unnecessary to argue it to this Court. This requirement is not a mere technicality, but goes to the heart of democratic procedures as they are understood in this country.

An opportunity to know the evidence offered by the opposition and to cross-examine witnesses produced by it is, as all know, not a foolproof method of arriving at the truth, but it is the best method we have been able to devise in several centuries of Anglo-American judicial procedure. It is a method without which no decision can be made by an administrative officer under our system of Government.

Superimposed on the evil technique of determining issues on the basis of evidence not disclosed to the parties, is the widespread use of informers by the Department of Justice and by other administrative local governing bodies which have aped the procedures of the Department of Justice. It is notorious that informers historically have been an unreliable breed, and our own recent history with informers

[1] Here even the tribunal deciding the case did not know the identity of the witnesses whose word it accepted.

is but the duplication of the history of many centuries of human experience. The recent revelations of Harvey Matusow, the recent recantations in the Lamb case now pending before the Federal Communications Commission, are but the most dramatic illustrations of the unreliability of informer testimony. None of this new, although perhaps it has only been recently brought to the attention of the public. Informed commentators for years have been writing and speaking on the unreliability of professional informers such as Paul Crouch, Louis Budenz, Manning Johnson, Leonard Patterson and a host of others.

We, of course, have no possible way of determining the nature of the so-called evidence on the basis of which the petitioner here was discharged. Perhaps the witness or witnesses who informed against him were Matusow and Crouch. Perhaps they were persons of similar occupation, still on the payroll of the FBI. Perhaps they were full time FBI informers. Perhaps they were neighbors, volunteers or private enemies who took this opportunity to demonstrate either their zeal to protect our country or their personal dislike of the petitioner. Actually, the character of the informer makes very little difference. Without an opportunity to confront and cross-examine witnesses, not even a partial guarantee can be offered that decisions will be just.

The respondent seeks to justify all of these strange and basically un-American procedures, including the non-disclosure of evidence, on the ground that they are required by national security. Apparently respondent believes that it is better to punish a thousand innocent persons than to permit one disloyal employee to maintain a job in the Federal Government, even one as remote from our defense program as Special Consultant to the Public Health Service in the Department of Health, Education and Welfare. This is a premise which no American, brought up in the traditions of our democracy, can possibly accept.

We agree wholeheartedly that at issue here is a question of national security. The evil which threatens our security, however, is precisely the evil against which the petitioner complains in this case. It is the evil of condemnation without trial. It is the evil of the destruction of the right of Americans to think and talk as they please. This evil is much more subversive and threatens our national existence much more seriously than any subversive conduct within the power of a special consultant to the Public Health Service, or, for that matter, a teacher in a public school or an employee in the Department of Printing and Engraving.

Our nation has experienced about eight years of loyalty investigations. In recent months there has been an increasing public demand for a re-evaluation of the entire process as it has become more and more clear that our fundamental liberties are endangered by an ever widening circle of purges. It is perhaps fortunate that this case comes before the Court at this time when the full impact of the loyalty program on our constitutional rights has become apparent.

Respectfully submitted,

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Committee *Amicus Curiae*.